No. 35218-8-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MICHAEL L. BACKEMEYER,

Defendant/Appellant.

Appellant's Brief

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C. STATEMENT OF THE CASE

Michael Backemeyer went to the bar at Peking North in Spokane, Washington, the evening of December 16, 2016. RP 135-39. He had multiple tattoos, a shaved head, and looked rather scruffy and "sketchy." RP 161, 228-29. The bartender and several other witnesses described Backemeyer as looking and acting weird wandering around the bar area. RP 139-42, 161-62, 227-28.

Nicholas Stafford was a doorman/bouncer at the bar. RP 158. He wasn't scheduled to work that night but was called to work because it was busier than usual. RP 159. Stafford is normally positioned at the door

checking ID and making sure people don't leave with any alcohol, etc. RP 160. However, that night he was out on the floor visiting with some patrons, drinking a beverage and wearing jeans and a T-shirt as opposed to a uniform. RP 149, 160, 227, 342-43 413.

Tiffany Tart was there with some friends singing karaoke. RP 408-09. She saw Stafford drinking a beverage talking with his friends. She thought Stafford was just another patron at the bar. RP 413.

Stafford's attention was drawn to Backemeyer and he decided to keep an eye on him. RP 163, 228. At some point, Stafford and the bartender decided it was time to ask Backemeyer to leave. 162-63. Stafford went to use the restroom and saw Backemeyer in the restroom drinking a beer not sold in the bar and rolling a marijuana joint. RP 229. Stafford took the beer away from Backemeyer and told him he had to leave. RP 229. Stafford never identified himself as an employee of the bar. RP 229-39. Backemeyer thought Stafford was just another patron like himself and couldn't understand why Stafford was so upset about the beer, which was empty anyway. RP 342-43. Stafford left to dispose of the beer and Backemeyer stayed in the restroom. RP 230.

After disposing of the beer can, Stafford returned to the restroom and told Backemeyer, "It's time for you to go." RP 230. Backemeyer said

he would leave once he gathered his coat and phone. RP 231, 352. After the two of them wandered around the bar five to ten minutes looking for Backemeyer's things, Stafford said, "You know, it's time for you to go, it's time for you to go, I've had enough, it's time to go." RP 232. Backemeyer told Stafford to get out of his face and started pushing Stafford in the chest. RP 233. Stafford testified he then pushed Backemeyer away and they tripped over some chairs and ended up on the floor with Stafford on top of Backemeyer. RP 235-36.

Tiffany Tart testified Stafford pushed Backemeyer into the bar knocking over Backemeyer as well as a bar stool. RP 414. Backemeyer got back up, Stafford shoved him again and the two of them ended up on the floor with Stafford on top. RP 414-15.

Backemeyer testified Stafford tackled and attacked him, got on top of him and elbowed him twice in the face knocking out some teeth. RP 359-62. Stafford denied punching Backemeyer in the face. RP 239-40. Since Stafford was bigger than himself, Backemeyer was afraid of getting seriously hurt; he pulled out his pocket knife and stabbed Stafford a number of times to get him off. RP 236-37, 364-66. None of Stafford's injuries were life-threatening. RP 331.

The bartender then got on top of Backemeyer but Backemeyer managed to squirm away and left the premises. RP 239.

The jury was instructed in pertinent part:

> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 16th day of December, 2016, the defendant assaulted Nicholas Stafford.
>
> (2) That the assault was committed with a deadly weapon;
>
> (3) That the defendant acted with intent to inflict great bodily harm . . .

CP 12.

> It is a defense to a charge of first degree assault and second degree assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 19.

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 20.

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force . . .

CP 21.

This last instruction, number 16, was proposed by the defense and objected to by the State. RP 437-38. The basis for the objection was that Backemeyer had no right of self-defense because at that point his right to be in the bar had been revoked. RP 437-38, 445-46. The Court allowed the instruction based on the impression, according to some of the testimony, that Stafford was just another patron and not an employee. RP 446-47.

During her closing argument, the prosecutor emphasized that Jury Instruction 16 did not apply to Backemeyer because his right to be there had been revoked by Stafford as an employee of Peking North. RP 465-66.

Defense counsel never argued during his closing that Stafford never identified himself as an employee of the bar and was wearing jeans

and a T-shirt as opposed to a uniform; or that Tiffany Tart saw Stafford drinking a beverage talking with his friends and thought Stafford was just another patron at the bar; or that Backemeyer thought Stafford was just another patron like himself. RP 484-503.

Regarding Jury Instruction 16, defense counsel told the jury:

> The state said that, Well, that Jury Instruction 16, whether or not you agree he had a lawful right to be there or not and it just comes down to, I guess, whether or not you believe Mr. Stafford was on duty. I don't know what it comes down to. She was correct. That doesn't take away from the entire self-defense claim. That's one instruction. Self-defense is still there even if you think he didn't have a lawful right to be there. If you are trespassed from a store and you go back and someone's attacking, killing you, you do not have to stand there and let them kill you because you've been trespassed here. The law gives you the right to defend yourself if you've been trespassed . . .

RP 501.

During jury deliberations, the jury submitted two inquiries. The jury first inquired, "Instruction No. 16 re in a place that a person has a right to be. Does defendant's possession of marijuana, outside beverage, and/or being asked to leave negate his right to be there and therefore right to lawful self-defense?" CP 30. The State proposed the response, "Read your jury instructions." RP 512. Defense counsel concurred but stated, "I'm a little concerned that they're trying to get rid of self-defense based off

that one instruction again . . ." RP 512. The Court responded to the jury inquiry, "Please read your instructions." CP 30.

The jury next inquired, "During any event, does commission of an illegal act negate the right to use lawful force?" CP 31. Both parties agreed to the court responding, "Please read your instructions." RP 514.

Backemeyer was convicted by the jury of first degree assault while armed with a deadly weapon. CP 27-28. This appeal followed. CP 55-56.

D. ARGUMENT

Mr. Backemeyer was denied his constitutional right to effective assistance of counsel when his attorney offered an inadequate "no duty to retreat" instruction , failed to propose a clarification in response to the jury's inquiries about that instruction, and failed to argue in closing that Stafford failed to identify himself as an employee and appeared to be a patron.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In *Strickland*, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this

assessment, the appellate court will presume the defendant was properly represented. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable

probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*., citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Appellate review on this issue is de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

In *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004), this Court found ineffective assistance of counsel where the defense counsel requested an inadequate self-defense instruction, which decreased the State's burden to disprove self-defense. Since Mr. Rodriguez maintained that any error that occurred was the result of ineffectiveness of counsel, the invited error doctrine did not apply. *Rodriguez*, 121 Wn. App. 180, 87 P.3d at 1203.

Self-defense requires only a "subjective, reasonable belief of imminent harm from the victim." *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The jury need not find actual imminent harm. *Id*.

The instructions should allow the jury to put themselves in the defendant's shoes and from that perspective determine the "reasonableness from all the surrounding facts and circumstances as they appeared to the defendant." *Id*. at 900, 913 P.2d 369.

In *Rodriguez*, the trial court instructed the jury that:

> A person is entitled to act on appearances in defending, if that person believes in good faith and on reasonable grounds that he is in actual danger of *great bodily harm*, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

Rodriguez, 121 Wn. App. 180, 87 P.3d at 1204 (emphasis added).

The court also instructed the jury on the requirements of assault in the first degree. And as part of that charge to the jury, the court defined "great bodily harm" as follows:

> Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Id.

Since this was the only definition of "great bodily harm" in the instructions to the jury, the *Rodriguez* court reasoned that the jury could easily find, and may have been required to find, that in order to act in self-defense, Mr. Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or

function. *Id*. A reasonable juror could read the instruction to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the battery at issue would result in great personal injury. *Id*., *citing State v. Walden*, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997).

The court could find no conceivable reason why Mr. Rodriguez's lawyer would propose these instructions as a tactic or strategy to advance Mr. Rodriguez's position at trial, where the net effect was to decrease the State's burden to disprove self-defense. *Rodriguez*, 121 Wn. App. 180, 87 P.3d at 1205. The prejudice prong of a claim of ineffective assistance of counsel was established since "these particular defense instructions struck at the heart of Mr. Rodriguez's defense, i.e., he was very afraid of Mr. Van Dinter. As instructed the jury was required to find that he was scared of death or at least permanent injury. And that is not the test." *Id*. For these reasons, the court reversed the conviction. *Id*.

The situation in the present case is similar to *Rodriguez*. As evidenced by its inquiries, the jury erroneously may have believed Instruction 16 negated any claim of self-defense if it found Backemeyer was not entitled to be on the premises. Defense counsel could have avoided this confusion had he not offered the instruction in the first place.

A “no duty to retreat” instruction need not be given when it is unnecessary to the defendant's case theory and when it would be superfluous because the issue of retreat was not raised or the facts show the defendant was in retreat. *State v. Wooten,* 87 Wn. App. 821, 825, 945 P.2d 1144 (1997). Such was the case, herein. Neither side raised the issue of retreat and the defense theory of self-defense was based on fear of injury rather than standing one’s ground.

Defense counsel was further deficient in not adding an additional sentence to the instruction stating, “Even if you find the defendant was not in a place where he had a right to be, he may still claim self-defense if the criteria are met as set forth in the prior instructions,” or words to that effect.

Once it became obvious from the inquiries that the jury was confused, defense counsel could have remedied the situation by proposing a clarifying response similar to the one set forth in the previous paragraph. Instead, defense counsel assented to simply telling the jury to read their instructions.

Perhaps defense counsel’s most egregious omission was not arguing to the jury that Backemeyer *was* in a place where he had a right to be. There was ample evidence brought out during the trial to support this

argument: Stafford was not positioned at the door checking ID as he normally would be. RP 160. Instead, he was out on the floor visiting with patrons, drinking a beverage and wearing jeans and a T-shirt as opposed to a uniform. RP 149, 160, 227, 342-43 413. Tiffany Tart saw Stafford drinking a beverage talking with his friends and thought Stafford was just another patron at the bar. RP 413. When Stafford took the beer away from Backemeyer and told him he had to leave, Stafford never identified himself as an employee of the bar. RP 229-39. Considering all this evidence, Backemeyer was justified in thinking Stafford was just another patron like himself who was getting in his face, not an employee ordering him to leave the premises.

Defense counsel never made any of these arguments to the jury. Instead, he told the jury, "Whether or not you agree he had a lawful right to be there or not and it just comes down to, I guess, whether or not you believe Mr. Stafford was on duty. I don't know what it comes down to. She [prosecutor] was correct." RP 501. Defense counsel missed the key issue here. There was ample evidence Stafford had been called for duty because the bar was very busy. The real issue that counsel failed to argue was that Backemeyer rightfully believed he was in a place where he had a right to be because Stafford had not identified himself as a representative

of the business, and did not appear to be one, when he told Backemeyer to leave.

As in *Rodriguez*, there is no conceivable reason for defense counsel to commit these errors and omissions as a tactic or strategy to advance Mr. Backemeyer's position at trial, where the net effect was to decrease the State's burden to disprove self-defense. *Rodriguez*, 121 Wn.App. 180, 87 P.3d at 1205. The prejudice prong of a claim of ineffective assistance of counsel is also established. It is clear from the jury's inquiries that the jury was seriously weighing self-defense until it erroneously concluded Instruction 16 negated any claim of self-defense if it found Backemeyer was not entitled to be on the premises. Therefore, the conviction must be reversed because there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d at 226.

E. CONCLUSION

For the reasons stated, the conviction should be reversed. Pursuant to RAP 15.2(f), Appellant's indigent status should continue throughout this appeal and he should not be assessed appellate costs if the State were to substantially prevail. See CP 53-54. Appellate counsel anticipates filing a report as to Appellant's continued indigency no later than 60 days following the filing of this brief.

Respectfully submitted January 10, 2018,

s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on January 10, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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